No. 07-716

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

WFMJ TELEVISION, INC.,

Petitioner,

v.

CATHERINE BOSLEY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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February 13, 2008

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QUESTIONS PRESENTED

1. Petitioner has challenged the Article III jurisdiction of the District Court to enforce a settlement on the basis that there was no controversy upon the filing of a Notice to Withdraw the Motion to Enforce Settlement. The Respondents assert that following the filing of the Notice, it was refiled as a Motion to Withdraw the Motion to Enforce the Settlement and thereafter the parties litigated the issue of the settlement terms for months before the Court found that a valid settlement agreement existed. Thus, the controversy was not moot and the 6th Circuit Court of Appeals correctly affirmed the District Court's decision.

2. Petitioner also asserts that the District Court lacked Article III jurisdiction upon the issuance of a dismissal entry dismissing the case with prejudice despite the express retention of jurisdiction over the terms of the settlement agreement. Respondents assert that the District Court acted in conformity with this Court's holding in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994) and the clear guidance reflected in the opinions dicta. Likewise, the decision of the 6th Circuit was in conformity with *Kokkonen* though Petitioner never raised the issue before the 6th Circuit Court of Appeals.

PARTIES TO THE PROCEEDING

Respondents Catherine Bosley and Richard Brown were plaintiff-appellees. As husband and wife, Catherine Bosley and Richard Brown, will hereinafter be referred to as Respondent.

Petitioner WFMJ Television, Inc. was a defendant in the lower court and appellant in the 6th Circuit Court of Appeals, along with John Urchak and Michelle Nicks. Though Mr. Urchak and Ms. Nicks are Respondents they are not represented by undersigned counsel nor are their positions advocated herein.

CORPORATE DISCLOSURE STATEMENT

Respondent (Catherine Bosley and Richard Brown) are individuals and therefore no publicly held corporations are implicated.

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RESPONDENT'S PRELIMINARY STATEMENT

Despite the Petitioner's summary of the history of the changing roles of the federal judiciary, the public policy in favor of settlements of cases without litigation remains strong. *See Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976), *cert. denied*, 429 U.S. 862, 97 S. Ct. 165, 50 L. Ed. 2d 140 (1976). What is plainly apparent, is that the District Court's decision confirming the Magistrate Judge's decision to enforce the settlement between the Petitioner and Respondent vindicated this public policy. The 6th Circuit Court of Appeals validated the District Court's conclusions by affirming the lower court's decision and recognizing that the Petitioner's efforts to continue and prolong this litigation were unavailing.

The Petition filed by WFMJ herein is simply the last "Hail Mary" in a string of futile attempts to prolong litigation, which WFMJ had settled some 26 months ago.

The litigation strategy of the Petitioner has been nothing short of frivolous. In the words of the 6th Circuit Court of Appeals, the arguments submitted by the Petitioner in the lower court level were both "meritless" and pure "conjecture."[1] The Court of

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[1] Opinion of the 6th Circuit Court of Appeals, Petitioner's Appendix at pp. 13a and 18a, respectively (hereinafter "Petitioner's App. at p. ___").

Appeals likewise referred to some arguments raised by the Petitioner as "untenable."[2]

Like the briefing both before the District Court and the Court of Appeals, the briefing submitted to this Court in WFMJ's Petition borders on sanctionable.

Petitioner has misrepresented the record and, most importantly, misrepresented its own conduct. Indeed, on at least three separate occasions, Petitioner stated to this Court that the Respondent unilaterally withdrew their Motion to Enforce the Settlement and that WFMJ did not "oppose." This position is nothing more than fiction.

On January 30, 2006, Petitioner filed a "Brief Concerning Whether a Settlement Was Achieved."[3] In this Brief, which was filed in the District Court, WFMJ advised the District Court that it "object[ed] to Plaintiffs' attempt to withdraw their Motion to Enforce what they claim is a valid settlement."[4] Petitioner expressed concern that the Plaintiffs would move to enforce the alleged agreement at any time "within the multi-year statute of limitations."[5] As such, the Petitioner asked the District Court to either conduct an "evidentiary hearing, or engage in a

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[2] Petitioner's App. at p. 13a.

[3] Respondent's Appendix at p. 1 (hereinafter "Respondent's App. at p. ___).

[4] Respondent's App. at p. 2.

[5] Respondent's App. at p. 2.

colloquy with Plaintiffs to ensure that by withdrawing their attempt at enforcement, they are knowingly and voluntarily relinquishing irrevocably their right to do so."[6]

In that same filing, Petitioner also provided what it considered to be the applicable legal framework, indicating that the Plaintiffs could not simply withdraw their Motion to Enforce, but rather, it was a motion which the Court needed to either grant or deny. The Petitioner framed the issue for the Court to decide post-settlement. The District Court subsequently granted an evidentiary hearing (as requested by the Petitioner) and concluded that a settlement had been achieved and found the Petitioner's position untenable.

Thereafter, Petitioner appealed to the 6th Circuit Court of Appeals, raising issues relating to the denial of various summary judgment motions, the denial of various motions for recusal, and issues pertaining to mootness. Not once did Petitioner raise the current challenge to the Article III jurisdiction of the District Court raised in the 2nd Question for review.

The conduct of the Petitioner cannot be condoned. This Petition should be denied, and this litigation should be brought to a well-deserved conclusion.

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[6] Respondent's App. at p. 2.

STATEMENT OF THE CASE

A. Background

This litigation stemmed from the appalling conduct of WFMJ and its agents in editing and disseminating excerpts from a video title "Spring Break 2003," where Respondent had appeared in a wet t-shirt contest. Following litigation surrounding the production of the original "Spring Break 2003," Plaintiffs acquired the copyrights to these images in an attempt to prevent further dissemination of this material.

After Petitioner's deplorable conduct of distributing these copyrighted images, Respondent initiated this litigation on December 23, 2004. The litigation was, to say the least, contentious. WFMJ and the other defendants jointly, and individually, filed motions to dismiss and motions for summary judgment (which were denied) and, throughout discovery, opposed the production of documents and witnesses, resulting in motions for protective orders, motions to compel, and evidentiary hearings before the magistrate judge. Defendants even sought to depose counsel for Respondent during the course of discovery.

All told, from the date of filing of the Complaint to the date that Petitioner's counsel filed his "Settlement Notice," there were 328 filings with the Court. The Defendants initiated at least 200 of these filings. Thus, when Petitioner notified the District Court that the case had settled, it was reasonable to assume that Petitioner had wearied of the litigation and was

content to bring it to an end. Nothing could have been further from the truth.

B. The Settlement and the Litigation that Follows

On November 23, 2005, following negotiations between Andrew Kabat, on behalf of Respondent, and Stephen Bolton, on behalf of Petitioner, the parties reached a settlement. This settlement was achieved by telephone.

On November 25, 2005, counsel for the Petitioner, David Marburger (an individual who did not participate in the final negotiations between Mr. Kabat and Mr. Bolton), notified the District Court that the case had settled. His "Settlement Notice" read:

> Defendants, WFMJ Television, Inc., Michelle Nicks, and John Urchak, hereby notify the Court that they have effectively reached a settlement with the Plaintiffs. The documents consummating the settlement are being drafted now. They have not yet been circulated, or (obviously) signed. Accordingly, there is no need to impanel a jury for trial on Monday, November 28, 2005.[7]

Petitioner did not advise the District Court that the parties were approaching a settlement, that the

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[7] *See* Petitioner's App. at pp. 45a-47a.

case had almost settled, or that a settlement was imminent or contingent on further negotiations. Rather, the Petitioner advised the Court that the case had, in fact, settled. Indeed, it was Petitioner's counsel, Mr. Marburger, who unilaterally notified the Court that the case had settled. Respondent was unaware of his intent to do so.

Relying upon the representation of Mr. Marburger, the District Court issued an Order on November 26, 2005. This Order read as follows:

> Upon representation of counsel that the above-captioned case has been settled between the parties, it is Ordered that the docket be marked, "Settled and Dismissed with Prejudice."
>
> Any subsequent Orders setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within Order.
>
> Further, the Court retains continuing jurisdiction to resolve disputes concerning the memorialization of this Settlement Agreement. *See Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994).

Through its Order, the District Court did two things: (1) it expressly indicated that a subsequent order setting forth different terms and conditions relative to the settlement and dismissal would supersede the Order issued on November 26, 2005; and (2) it expressly indicated that it was retaining

jurisdiction over the Settlement Agreement to resolve disputes pursuant to this Court's Decision in *Kokkonen v. Guardian Life Insurance Co.* Neither Petitioner or Respondent objected to the Court's retention of Jurisdiction.

Thereafter, Petitioner, through Attorney Marburger, submitted a proposed Settlement Agreement that did not reflect the discussions of Mr. Kabat and Mr. Bolton. It was much broader than the parties had agreed and finalization of the written agreement broke down. On December 15, 2005, Plaintiffs filed a Motion to Enforce the Settlement Agreement. The next day, the Petitioner filed an Opposition to the Motion to Enforce the Settlement Agreement and specifically asked for an evidentiary hearing in a separate motion filed with the Court.[8] On January 19, 2006, the Plaintiffs filed a "Notice of Withdrawal of Motion to Enforce Settlement Agreement reached on November 23, 2005." The docket shows that this was filed in error and should have been filed as a motion. As such, the following day, the same document was filed as a "Motion to Withdrawal [sic] Document Motion to Enforce Settlement Agreement." Thus, as of January 20, 2006, there was a pending Motion to Withdraw the Motion to Enforce the Settlement Agreement. However, part and parcel with the "Motion to Withdraw the Motion to Enforce the Settlement Agreement" was another motion filed on January 19, 2006, captioned a "Motion to Vacate the

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[8] Respondent's App. at pp. 9-14.

Dismissal Entry and a Request for a New Trial Date." These Motions remained pending before the Court until such time as the Court resolved the issue of whether a settlement had been achieved.

Consistent with the notion that a controversy still existed, as previously referenced, Petitioner filed its "Brief Concerning Whether a Settlement Was Achieved" on January 30, 2006. An evidentiary hearing was held on January 30, 2006. All parties participated.

Thereafter, Respondent filed a "Brief in Support of the Motion to Enforce Settlement" on February 3, 2006, which further supported the notion that the parties were fully engaged in a dispute over whether a settlement agreement had been achieved (as opposed to merely seeking to vacate the Court's dismissal entry).

On February 13, 2006, Petitioner filed a post-brief and "closing argument." Petitioner even filed an Amended or Substituted Brief on February 15, 2006. At no time did Petitioner assert that the Court lacked Article III jurisdiction to resolve the dispute over the settlement agreement. Petitioner also did not question whether the Court had effectively retained jurisdiction over this dispute. Instead, both Petitioner and Respondent had expressly participated in the process of determining the terms of the settlement agreement.

On February 24, 2006, the Magistrate Judge issued a Report and Recommendation recommending that the Court grant Plaintiffs' Motion to Enforce the

Settlement Agreement and deny Plaintiffs' Motion to Vacate the Order of Settlement. The Magistrate also recommended that the Court deny Plaintiffs' Motion to Withdraw their Motion to Enforce the Settlement Agreement and to find that the parties had agreed to an oral settlement agreement under the terms outlined in the Report and Recommendation. On February 27, 2006, Petitioner filed a Notice of Intent to File Objections to the Magistrate Report, but then failed to timely file their objections.[9] Despite numerous opportunities to raise issues concerning the "Mootness" doctrine or questioning the Court's Article III jurisdiction, Petitioner never asserted these issues in front of the District Court. Rather, Petitioner and the Respondent litigated issues on the subject of the Motion to Enforce the Settlement with vigor.

After the District Court adopted the Magistrate Judge's Report and Recommendation concluding that a settlement had been achieved, the Petitioner took a new tack – it decided to attack the credibility and impartiality of the Magistrate Judge and the District Judge. Thereafter, Petitioner raised, for the first time, concerns that the Court had prejudged the settlement issue. Thus, the Petitioner moved to

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[9] This was a common practice of Petitioner in the District Court. Petitioner missed deadlines and/or filed pleadings late on at least 30 occasions during the pendency of the matter in front of the District Court.

recuse the District Judge, not once, but twice. Notably, however, in Petitioner's Motion to Recuse, it also did not address any purported lack of jurisdiction or the mootness doctrine. Rather, Petitioner simply sought a different Judge to address the issue of the validity of the settlement.

Following the District Court's denial of the Motion to Recuse and affirmation of the Report and Recommendation, the District Court entered a new judgment entry, which found that the case had settled and set forth the terms, thus superseding its Dismissal Entry of November 26, 2005.

Thereafter, Petitioner took an appeal to the 6th Circuit Court of Appeals, and while raising for the first time the issue of mootness, the Petitioner never challenged the Article III jurisdiction of the District Court on the basis of *Kokkonen*. To the contrary, they expressly acknowledged the right of the Court to retain ancillary jurisdiction over the issue of settlement and cited *Kokkonen* as the authority for that proposition.[10]

The 6th Circuit Court of Appeals affirmed the reasoning of the Magistrate Judge and the District Judge below and found that a settlement had been achieved. The Court further found that the mootness doctrine did not apply because there clearly was a

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[10] Petitioner/Appellant Brief to the 6th Circuit Court of Appeals at p. 31.

case in controversy as the parties contentiously litigated the issue of settlement after the purported Notice of Withdrawal of the Motion to Enforce Settlement for 15 more months.

Now, after submitting literally hundreds of pages of briefing on the issue of whether summary judgment should have been granted, whether the trial court should have recused itself, and whether settlement was achieved, Petitioner asserts for the first time that Article III jurisdiction was destroyed upon the issuance of a dismissal entry with prejudice by the Court despite its obvious intent to retain jurisdiction to resolve issues over the settlement, which was itself communicated by Petitioner's own counsel. This Court should not condone such conduct and the Petition for a Writ of Certiorari of WFMJ should be denied.

REASONS FOR DENYING THE PETITION

The Petitioner argues that this Court should grant its Petition for Certiorari "to resolve the continuing confusion among the lower federal courts arising from *Kokkonen's* dicta. . . ."[11] However, the assertion of confusion is grossly overstated. Since this Court's decision in *Kokkonen*, the District Courts and the Appellate Courts have consistently interpreted *Kokkonen* as permitting the retention of limited,

[11] *See* Petition for Writ of Certiorari at p. 25.

ancillary jurisdiction to enforce settlement agreements when the District Court either (1) incorporates the terms of the agreement into its order of dismissal; or (2) when the Court in its order states that it is "retaining jurisdiction" over the settlement agreement. *See Kokkonen*, 511 U.S. at 381.

Here, the Court expressly retained jurisdiction over the settlement agreement and preserved its ancillary jurisdiction to enforce the agreement.

I. The 6th Circuit Correctly Concluded That The Issue Was Not Moot And That An Issue In Controversy Still Existed

The Petitioner argues that the "Notice of Withdrawal of Plaintiffs' Motion to Enforce Settlement Agreement" divested the Court of Article III jurisdiction as the issue was moot and no controversy existed. However, that is not the position that the Petitioner expressly took with the District Court.

On January 30, 2006, the same day that Magistrate Judge Limbert conducted an evidentiary hearing on the issue of whether a settlement had been achieved, the Petitioner chimed-in and submitted briefing on the issue of whether the issue was moot. Indeed, in its "Brief Concerning Whether a Settlement Was Achieved," Petitioner advised the District Court that WFMJ "object[ed] to Plaintiffs' attempt to withdraw their motion to enforce what they claim is a

valid settlement."[12] It informed the District Court that its position was that the Court "should either require an evidentiary hearing, or engage in a colloquy with Plaintiffs to insure that they understand that, by withdrawing their attempt at enforcement, they are knowingly and voluntarily relinquishing irrevocably their right to do so."[13] Petitioner also cited to cases which supposedly stood for the proposition that Plaintiffs could not unilaterally withdraw their motion to enforce the settlement.[14] Petitioner further expressed concern that the Plaintiffs were merely "tabling" their motion for assertion at a later time and asserted to the District Court that:

> . . . Plaintiffs either believe they have a valid claim [to enforce settlement] or they are subject to sanctions. *See, generally*, Fed. Civ. R. Proc 11. If they believe the claim is valid, Plaintiffs should be required to have the Court resolve, as a matter of law, whether

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[12] Respondent's App. at p. 2.

[13] Respondent's App. at p. 2.

[14] *See* Respondent's App. at pp. 2-3, citing C.J.S., *Motions* §41 ["a motion may not be withdrawn after submission without the consent of the court, which ordinarily will not be given over the objection of the opposing party"]; *Robinson v. Worthington*, 544 F. Supp. 956, 963 (M.D. Ala. 1982) [Petitioner asserted that the case stood for the proposition that "the Federal Rules of Civil Procedure do not afford a litigant a right to withdraw a motion once it is filed with the Court"]; *In re White Farm Equipment*, 23 B.R. 85, 93(Bankr. N.D. Ohio 1982) [Petitioner writes: "'purported withdrawal' of a motion a 'nullity'."].

> there is such a valid claim before the Defendants are compelled to go to the remarkable expense of firing back up for trial.[15]

After the purported Notice of Withdrawal, Defendants filed a total of twenty-eight (28) Briefs and/or Notices with the Court. None challenged the issue of whether the Court had the authority to enforce the settlement agreement.

The District Court did exactly what the Petitioner asked. The Magistrate Judge conducted an evidentiary hearing, entertained hundreds of pages of briefing, and issued a Report and Recommendation, which happened to conflict with Petitioner's view of the settlement. Thereafter, the Petitioner (albeit in an untimely manner) attacked that decision and urged the District Judge to reach a different result. However, that did not happen.

Now, in the midst of a new-found argument, Petitioner asserts that the Court lacked jurisdiction upon the filing of the "Notice of Withdrawal." Notably, however, Petitioner actually referred to the "Notice of Withdrawal" as a "nullity" in its "Brief Concerning Whether a Settlement Was Achieved." True to form, since that argument did not work, Petitioner has decided to recast its position and take a diametrically opposite stance before this Court.

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[15] Respondent's App. at p. 5.

Further, the Petitioner continued reliance on the *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998) decision is misplaced and certainly does not warrant granting the petition for certiorari herein. First, *Earth Island* does not involve the enforcement of a settlement agreement, the retention of ancillary jurisdiction, or implicate the *Kokkonen* decision. Instead, that case involved a question of whether to enforce revised regulations over a governmental entity after the case had been concluded. There was no live case or controversy at the time the motion to enforce was filed. There was no express retention of ancillary jurisdiction, nor did any party consider there to be a live dispute by the time the Court issued its ruling. The Court of Appeals stated: "Before [Plaintiffs] Motion to Enforce, the trial court had fully resolved the dispute and entered final judgment, thus extinguishing the entire controversy before it." *Id.* at 1356.

The same obviously cannot be said about this case. When Plaintiffs attempted to withdraw their Motion to Enforce Settlement, the Notice was re-characterized as a Motion. The Petitioner then opposed the Respondent's right to withdraw the Motion, demanding a hearing, arguing its position on the issue of settlement, and advocating for the Court to adopt its version of the scope of settlement, or alternatively, to conclude that no settlement had been reached. There clearly was something for the District Court to resolve.

Finally, the District Court did not exceed its jurisdiction – it resolved a dispute concerning the memorialization of a settlement agreement – an issue expressly reserved by the Court to resolve in its Order of Dismissal. Indeed, the 6th Circuit Court of Appeals previously noted the distinction between this case and *Earth Island* and rejected Petitioner's argument.

II. Contrary To The Position Of Petitioner, There Is No Confusion In The Lower Courts On How To Apply *Kokkonen*

The unanimous opinion in *Kokkonen* is not confusing, and has not resulted in inconsistent interpretation. As Justice Scalia wrote in *Kokkonen*,

> the situation would be quite different if the parties' obligations to comply with the terms of the settlement agreement had been part of the order of dismissal – either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.

Kokkonen, 511 U.S. at 381.

In the present case, this is not a dismissal pursuant to Fed. R. Civ. Proc. 41(a)(1) as the Plaintiffs did not stipulate to the dismissal. Rather, the dismissal was, implicitly, pursuant to Fed. R. Civ. Proc. 41(a)(2) in that the Court dismissed the matter *sua sponte* upon notice from the Petitioner that the case had

been settled. The Court then attached conditions to the dismissal entry, which retained jurisdiction with the Court to issue a superseding order with additional terms and conditions to resolve disputes over the memorializing of the settlement agreement.

The Petitioner refers to the "disarray" in the lower courts but fails to identify how courts are interpreting *Kokkonen* inconsistently. In suggesting that the 7th Circuit has interpreted *Kokkonen* differently, the Petitioner ignores the consistency with which *Kokkonen* has been applied by the 7th Circuit, and even by Judge Posner.

For example, *In re VMS Securities Litig. v. Prudential Securities, Inc.*, the 7th Circuit, following *Kokkonen*, concluded that the District Court "need not use 'any magic form of words' to retain jurisdiction – [a]ll that is necessary is that it be possible to infer that [the court] did intend to retain jurisdiction." *In re VMS Securities Litig. v. Prudential Securities, Inc.*, 172 F.3d 1372, 1322 (7th Cir. 1996). In the 13 plus years since *Kokkonen*, one judge, Judge Posner, has concluded that the Court may not retain jurisdiction over a matter which is dismissed with prejudice, even if the retention was to enforce settlement agreement pursuant to an express retention of jurisdiction under *Kokkonen*. *See Lynch v. Samatamason*, 279 F.3d 487, 489 (7th Cir. 2002). However, the language in *Lynch* relied upon by Petitioner is merely *dicta* and of no significance to the actual holding rendered by Judge Posner. In *Lynch*, the District Judge found that a valid settlement had

been reached between the parties. Based upon the settlement the District Court dismissed the case with prejudice and retained jurisdiction to enforce the settlement. Judge Posner commented that the retention of jurisdiction was of no effect because the case had been dismissed. However, such comment was superfluous to the Court's affirmation of the District Court's decision finding a settlement and dismissing the case.

Four years later in *Shapo v. Engle*, 463 F.3d 641, 643 (7th Cir. 2006), Judge Posner again addressed the issue of enforcement of a settlement agreement, following a dismissal with prejudice. Rather than adopt the principle advocated herein by Petitioner, Judge Posner gave lip service to the concern that the dismissal with prejudice divested the court of jurisdiction, but then concluded that the District Court "appears from the judgment order itself . . . to retain jurisdiction until the settlement – incomplete at the time that the order was made – was fully implemented . . . " *Shapo,* 463 F.3d at 643. The Court then remanded the case to the District Court to "clarify the judgment" to determine if a "Master Pay Agreement" was part of the settlement. If the dismissal with prejudice had divested the Court of jurisdiction (as the Petitioner suggests), there would have been nothing for the Court to clarify.

Other panels of the 7th Circuit have reiterated a view consistent with the 6th Circuit herein, that "the doctrine of ancillary jurisdiction confers federal jurisdiction over a case outside federal jurisdiction in which the Plaintiffs seek to enforce a settlement

agreement, as long as the district court . . . retained jurisdiction to enforce the terms of the agreement." *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000) [Court found ancillary jurisdiction to exist for action to enforce settlement agreement removed from state court to federal court after "final" judgment following settlement of class action suit in Federal Court where court retained the jurisdiction to enforce the settlement agreement].

Finally, what is abundantly clear, is that the lower courts interpret the *Kokkonen* decision on a case-by-case basis because of the underlying facts and circumstances of the settlement and judgment entry of the Court – not because of any disarray or confusion by the lower courts as to the manner in which *Kokkonen* should be interpreted.

CONCLUSION

Based upon the foregoing, this Court should deny the Petition for Certiorari filed by Petitioner.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CATHERINE BOSLEY, *et al.*, Plaintiffs	Case No. 4:04cv2529
	Judge James Gwin
	Mag. Judge George J. Limbert
vs.	(Filed Jan. 30, 2006)
21 WFMJ TV, *et al.*, Defendants	

BRIEF CONCERNING HEARING ON WHETHER A SETTLEMENT WAS ACHIEVED SUBMITTED BY WFMJ

COMES NOW THE DEFENDANT, WFMJ TV, through counsel who has entered a limited appearance for purpose of litigating the hearing on Plaintiffs' motion to enforce a claimed settlement agreement, and submits the following Memorandum relative to the issues which might arise at the January 30, 2006 hearing.

I

WFMJ's position continues to be the only one compelled by the facts that occurred, and the law applicable to those facts. The abridged cell phone discussions between Plaintiffs' counsel and Defendants' counsel while the latter drove home through a snowstorm on Thanksgiving Eve did not form a

complete or valid settlement contract that is enforceable by specific performance.

WFMJ objects to Plaintiffs' attempt to withdraw their motion to enforce what they claim is a valid settlement. Plaintiffs' withdrawal is not predicated on any reconsideration of the validity of the contract: they continue to insist that the contract exists. Implicit in their attempt to withdraw their previous efforts to enforce the agreement is the notion that Plaintiffs may move to enforce the alleged agreement at any time within the multi-year statute of limitations. Thus, this Court should either require an evidentiary hearing, or engage in a colloquy with Plaintiffs to insure that they understand that by withdrawing their attempt at enforcement they are knowingly and voluntarily relinquishing irrevocably their right to do so. WFMJ also wishes to supply the proper legal framework upon which the issue os to be decided.

II

This Court's ruling was proper that Plaintiffs' may not withdraw their motion to enforce settlement. Generally, "a motion may not be withdrawn after submission without the consent of the court, which ordinarily will not be given over the objection of the opposing party." See, C.J.S., *Motions* § 41. The Federal Rules of Civil Procedure do not afford a litigant a right to withdraw a motion once it is filed with the court. See, *Robinson v. Worthington,* 544 F.Supp. 956,

963 (M.D. Ala. 1982). In *Robinson,* the district court denied a party permission to withdraw a summary judgment motion when the opposing party had already filed an opposition and the motion had been pending for an extended period of time. 544 F.Supp., at 964-65. The court also considered the prejudice to the adverse party and whether the withdrawal would "help resolve the litigation at an early date." *Robinson,* 544 F.Supp., at 965.

The Bankruptcy Court of this district has ruled that a plaintiffs' "purported withdrawal" of a motion was a "nullity." *In re White Farm Equip. Co.,* 23 B.R. 85, 93 (Bankr. N.D. Ohio 1982), summary judgment reversed on other grounds, 23 B.R. 85 (N.D. Ohio 1984). The court cited state court law that provides that "after a motion is submitted, by making oral argument thereon or the filing of moving papers, it may not be withdrawn in the absence of consent of all parties or leave of court." See, *White Farms, supra,* 23 B.R. at 93. The court refused to withdraw the motion:

> In the instant proceeding, counsel for Plaintiffs presumes that he may file a motion with the Court, have it pre-tried, argue it at great length, and then, after sensing that the Court considers it disfavorably, notice a withdrawal of it without procuring nor even seeking either the consent of the parties or leave of the court. Such disorderly practice not only is an affront to the Court but, if sanctioned, would play havoc with motion practice for the most obvious of reasons: motions

> would take on an ephemeral character at the with and caprice of the movant.

Id., 23 B.R. at 93. A similar result occurred in a patent case, where the party moved for dismissal on the grounds of lack of personal jurisdiction, and then attempted to withdraw the motion. See, *Safer Display Technologies, Ltd. v. Tatung Co.*, 227 F.R.D. 435, 441 (E.D. Vir. 2004). The court ruled that it would not "allow a situation to occur where jurisdictional discovery is short-circuited, the merits are fully litigated, and the defense is later reasserted on appeal without a sufficient factual record from which the issue can be resolved. Allowing such a chain of events to unfold would waste precious judicial resources and result in a *miscarriage* of justice." *Id.*, 227 F.R.D., at 442.

Here, in their papers seeking to withdraw their motion to enforce the alleged settlement contract, Plaintiffs continue to insist that they have contractually released the WFMJ defendants from liability. Merely "tabling" their motion to enforce has the immediate effect of propelling the defendants to go to the substantial expense of gearing back up for trial. While that is the expected result when there is no settlement, WFMJ's concern here is what WFMJ expects is the concern of the Court: that Plaintiffs' "disorderly practice" of giving a notice of withdrawal, without procuring or seeking the consent of the parties and leave of the Court "is an affront to the Court" and converts motions into filings of "ephemeral character," the life of which is determined by the

"caprice of the movant." See, *White Farms, supra,* 23 B.R. at 93. WFMJ's additional concern is that Plaintiffs will renew their efforts at specific performance at some point after the Defendants have spent more time and money in preparing for or going to trial. Plaintiffs are attempting, *sub silentio,* to hold onto their contract claim while proceeding to trial, thus effectively *making* WFMJ an insurer against a bad trial result.

The Plaintiffs either believe they have a valid claim or they are subject to sanctions. *See, generally,* FED R. CIV. PROC. 11. If they believe the claim is valid, Plaintiffs should be required to have the Court resolve, as a matter of law, whether there is such a valid claim before the Defendants are compelled to go to the remarkable expense of firing back up for trial. If Plaintiffs continue to insist that they do not want to go forward with their contract enforcement claim "at this time," the Court should rule either that the Plaintiffs have waived their right to proceed on their contract claim; or, that they have no contract as a matter of law because they have defaulted on their burden to demonstrate the existence of a settlement contract by clear and convincing evidence, despite being given the opportunity to demonstrate its existence.

III

As to the merits of the claim itself, there is no settlement. This is not to say that there were not

settlement discussions, nor is it to say that they were not fruitful in that substantial progress was made. But a desire to settle a case and good faith efforts to settle a case cannot supplant what actually occurred. Nor can a desire to settle a case and good faith efforts to settle a case change the applicable law.

State contract law governs whether litigants have formed a binding settlement contract. *See, e.g., Hageman v. Signal L.P. Gas, Inc.,* 486 F.2d 479, 487 (6th Cir. 1973). Plaintiffs bear the burden of establishing the existence of an settlement agreement, as they are the parties *claiming* its existence. *See, Nilavar v. Osborn,* 127 Ohio App.3d 1, 11, 711 N.E.2d 726, 732 (1998). Where the discussions among counsel were outside of the court's presence and supervision, the party seeking judicial enforcement must establish by clear and convincing evidence that the discussions reached the stage of creating an enforceable settlement contract that resolves all issues. See, *Anschutz v. Radiology Assocs. of Mansfield, Inc.,* 827 F. Supp. 1338, 1344 (N.D. Ohio 1993).

The Ohio Supreme Court has ruled that "courts should be particularly reluctant to enforce ambiguous or incomplete contracts that aim to memorialize a settlement agreement between adversarial litigants." See, *Rulli v. Fan Co.,* 79 Ohio St. 3d 374, 377, 683 N.E.2d 337, 339 (1997). Indeed, "[w]here parties dispute the meaning or existence of a settlement agreement, a court may not force an agreement upon the parties." *Id.,* 79 Ohio St. 3d at 377, 683 N.E.2d at 339. Ohio's highest court explained that to force an

agreement upon the parties where one does not exist "would be to deny the parties' right to control the litigation, and to . . . adopt . . . the interpretation of one party, rather than enter judgment based upon a mutual agreement." See, *Rulli,* 79 Ohio St. 3d, at 377, 683 N.E.2d, at 339. Even where terms of a claimed settlement contract appear at first blush to be reasonably clear, where the litigants interpret those terms differently, there may be no enforceable settlement contract. *Id.,* 79 Ohio St. 3d, at 377, 683 N.E.3d at 339.

Applying these standards, the evidence will demonstrate quite clearly that while the parties made substantial progress on November 23, 2005, coming to agreement on the one term that had so long been the sole issue of negotiation and so hotly contested, that agreement and general discussions do not a settlement agreement make, no matter how badly anyone wants it to be.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed on January 30, 2006 utilizing the Court's CM-ECF system. The system will electronically send copies to all counsel of record. Parties may access this filing by using the Courts CM-ECF system.

/s/ *John B. Juhasz*
JOHN B. JUHASZ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CATHERINE BOSLEY, RICHARD BROWN, Plaintiffs, vs. WFMJ TELEVISION, INC., *et al.*, Defendants.	CASE NO.: 4:04-CV-02529 JUDGE JAMES S. GWIN **Motion Of Defendant WFMJ Television, Inc. For Evidentiary Hearing To Resolve Disputed Facts As To Whether The November 23, 2005, Thanksgiving Eve Cell Phone Conversation Between Defense Counsel Stephen Bolton and Plaintiffs' Counsel Andrew Kabat Constitutes A Contract Finally Resolving All Settlement Terms** (Filed Dec. 16, 2005)

Defendant WFMJ Television, Inc. hereby moves for an evidentiary hearing to determine whether there is a final and complete settlement contract between defendants and plaintiffs Catherine Bosley and Richard Brown or, in the alternative, requests that this Court summarily deny plaintiffs' motion to enforce settlement. WFMJ denies various facts attested by Bosley's counsel in Bosley's Motion to Enforce Settlement, and denies that a single cell phone

conversation on the eve of Thanksgiving between Andrew Kabat and Stephen Bolton constituted the entire settlement agreement.

A memorandum in support and a declaration of Stephen Bolton are attached and are incorporated by reference.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically on December 16, 2005, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for plaintiffs, Andrew A. Kabat and Shannon J. Polk, Reminger & Reminger Co. L.P.A., 1400 Midland Building, 101 Prospect Avenue West, Cleveland, Ohio 44115.

/s/ Aaron J. Rupert
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CATHERINE BOSLEY, RICHARD BROWN, Plaintiffs, vs. WFMJ TELEVISION, INC., *et al.*, Defendants.	CASE NO.: 4:04-CV-02529 JUDGE JAMES S. GWIN **Memorandum in Support of Motion Of Defendant WFMJ Television, Inc. For Evidentiary Hearing To Resolve Disputed Facts As To Whether The November 23, 2005, Thanksgiving Eve Cell Phone Conversation Between Defense Counsel Stephen Bolton and Plaintiffs' Counsel Andrew Kabat Constitutes A Contract Finally Resolving All Settlement Terms** (Filed Dec. 16, 2005)

On November 23, 2005, the night before Thanksgiving, while counsel for WFMJ Television, Inc., Stephen Bolton, was driving to Youngstown through a blizzard, he had a cell phone conversation with counsel for plaintiffs, Andrew Kabat. WFMJ denies that the parties reached and agreed on all material terms

of a final settlement contract during that conversation.

"[W]here material facts concerning the existence of an agreement to settle are in dispute, the entry of an order enforcing a settlement agreement without a plenary hearing is improper." *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 622 (6th Cir. 1973). *See also Re/Max Intern., Inc. v. Realty One, Inc.*, 271 F.3d 633, 646 (6th Cir. 2001) ("an evidentiary hearing is required where facts material to an agreement are disputed"); *Aro Corp v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) ("an evidentiary hearing should be held when a substantial factual dispute exists" about the material terms of a settlement agreement); *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 377, 683 N.E.2d 337, 339 (Ohio 1997) ("[g]iven the lack of finality and the dispute that evolved subsequent to the initial settlement hearing, we hold that the trial judge should have conducted an evidentiary hearing to resolve the parties' dispute about the existence of an agreement or the meaning of its terms"); *Tabbaa v. Koglman,* 777 N.E.2d 338, 342, 149 Ohio App.3d 373, 379 (Ohio App. 2002) ("the trial court is required to hold an evidentiary hearing when the party opposing the agreement alleges . . . any other factual dispute concerning the existence of the terms of a settlement agreement").

WFMJ denies that a single cell phone conversation on Thanksgiving eve between Stephen Bolton and Andrew Kabat constitutes a final and complete settlement agreement comprised of only the literal

words uttered over the phone. Stephen Bolton's declaration submitted with this memorandum attests to genuine and material factual disputes between WFMJ and Bosley that necessitates an evidentiary hearing if the Court does not summarily deny plaintiffs' motion to enforce the alleged settlement agreement.

Respectfully submitted,

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